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No. 82-594

In the Supreme Court of the United States

OCTOBER TERM, 1982

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

RITTER TRANSPORTATION, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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1. The Motor Carrier Act of 1980, 49 U.S.C. (Supp. IV) 10101 *et seq.*, provides that an applicant for motor carrier authority must make a prima facie showing that it is fit, willing, and able to provide the service for which it requests authority. 49 U.S.C. (Supp. IV) 10922(a)(1). The Act also authorizes the Interstate Commerce Commission to remove restrictions on motor carriers' existing authority where the removal would, among other things, "reasonably broaden the categories of property authorized by the carriers' certificate or permit" (49 U.S.C. (Supp. IV) 10922(h)(1)(B)(i)) or "eliminate any other unreason able restriction that the Commission deems to be wasteful of fuel, inefficient, or contrary to the public interest" (49 U.S.C. (Supp. IV) 10922(h)(1)(B)(v)).

In this case, respondent Port Norris Express Co., a motor carrier authorized to transport cullet (broken glass) in bulk, applied under the restriction removal provisions to broaden

its authority to all commodities in bulk. The Commission granted the application in a summary opinion, without any finding that Port Norris was fit, willing, and able to transport all commodities in bulk (Pet. App. 7a-8a). On petition for review, the court of appeals "recognize[d] that * * * [its] scope of review is * * * narrow", but it ruled—explicitly following the Fifth Circuit's decision in *Steere Tank Lines, Inc.* v. *ICC*, 666 F.2d 255 (1982) (*Steere I*), petition for cert. pending, No. 82-41 (filed July 9, 1982) — that "[t]he term 'reasonably broaden', as used in § 10922(h)(l)(B)(i) [the restriction removal provision], includes a consideration of whether the applicant is 'fit, willing and able' " (Pet. App. 5a). Because the Commission's order did not reflect any consideration of Port Norris's fitness, willingness, or ability, the court vacated the Commission's order and remanded for further proceedings. The court of appeals emphasized, however, that "the showing that an applicant is fit, willing, and able 'need not be elaborate' and that the form and details of the showing 'are, in the first instance, matters that should be addressed to the Interstate Commerce Commission.' * * * The ICC retains broad discretion * * * to define appropriate commodity categories * * * [and to] determin[e] what facilities and equipment may be required" (Pet. App. 6a, quoting *Steere I, supra*, 666 F.2d at 258). The court accordingly allowed the Commission to determine on remand, in the first instance, the amount of proof necessary to establish fitness, willingness, and ability.[1]

2. The restriction removal provisions of the Act do not expressly direct the Commission to consider whether a carrier is fit, willing, and able. The Commission urges (Pet. 6-7) that the court of appeals erred when it held that these

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[1]The Commission has sought certiorari; the United States was a party below (see 28 U.S.C. 2344, 2348) and is therefore a respondent in this Court.

factors are nevertheless relevant to the question whether a broadening of a carrier's certificate would be "reasonable" within the meaning of those provisions. Whether or not the Commission's position is correct, the holding of the court of appeals is not inconsistent with the view of any other court of appeals. It comes at an interlocutory stage of this litigation. Most important, that holding is so qualified and guarded that it is uncertain how substantial an impact it will have on the Commission's ability to carry out the statute's deregulatory scheme. In light of these circumstances we cannot urge the Court that this ruling should be reviewed at this time.

It should be noted that the court of appeals did not bar the Commission from granting Port Norris broader authority, and it is entirely possible that on remand the Commission will find it easy to conclude that the carrier is in fact fit, willing and able to provide the broader service. Indeed, given the court of appeals' emphasis on the deference owed the Commission, it is quite plausible to suppose that in virtually every case where the Commission would at present be inclined to broaden a carrier's authority, the court of appeals' "fit, willing and able" test could be easily satisfied.

Recent decisions of the Fifth Circuit, whose holding in *Steere* was closely followed by the court of appeals, suggest that the "fit, willing, and able" requirement will be interpreted, in our view correctly, to impose only a minimal burden on applicants.[2] For example, the Fifth Circuit recently suggested that an applicant meets its burden by demonstrating that "it is willing and has the financial

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[2]Indeed, a principal objective of the Motor Carrier Act of 1980 was to ease the regulatory licensing burdens on those desiring to engage in the interstate transport of goods. The Act, for example, reduced the evidentiary showing that a new applicant must make. See 49 U.S.C. (Supp. IV) 10922(a); H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. 12-14 (1980).

resources to obtain the equipment" needed to conduct the desired transportation. *Steere Tank Lines, Inc.* v. *ICC*, 675 F.2d 103, 104 n.2 (5th Cir. 1982) (*Steere II*). See also *J.H. Rose Truck Lines* v. *ICC*, 683 F.2d 952, 955 (5th Cir. 1982) (fitness demonstrated through prior leasing experience); *J.H. Rose Truck Lines* v. *ICC*, 683 F.2d 943, 949 (5th Cir. 1982) (applicant need not own terminals if it arranges for truck maintenance and repair elsewhere); *Alamo Express, Inc.* v. *ICC*, 673 F.2d 852, 861 (5th Cir. 1982) (transportation to nine points from coast to coast sufficient to support nationwide grant of authority); *American Trucking Associations, Inc.* v. *ICC*, 669 F.2d 957, 963 n.7 (5th Cir. 1982) (Commission need not require possession of specialized equipment and can infer fitness from past successful operations).

Moreover, the Commission recently held that an applicant with no current bulk equipment and no definite plans to provide bulk service is nonetheless fit, willing, and able to provide that service if it states that it is willing to accept a certificate that includes bulk authority so that it may allow itself flexibility in the future, and if it shows that it is able to acquire the equipment necessary to meet future demands as they arise. *Vinci's Express, Inc., Extension - Five New Jersey Counties*, No. MC-32505 (Sub. No. 10) (Mar. 26, 1982), petition for review pending *sub nom. Port Norris Express Co.* v. *ICC*, No. 82-3321 (3d Cir.). We believe this holding to be correct, and we see no basis for concluding at this time that any court of appeals would reject it.

Accordingly, there is substantial uncertainty about just what impact the court of appeals' decision will have on the Commission's ability to implement the national transportation policies set forth in the Motor Carrier Act of 1980. We

are therefore unable to conclude that the Commission's petition raises issues that warrant review by this Court at this time.[3]

Respectfully submitted.

REX E. LEE
Solicitor General

JANUARY 1983

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[3]As the Commission states (Pet. 6), the issue in this case is the same as that presented in *Steere I, supra*, and the court of appeals' holding in this case closely parallels the holding in *Steere I*. Our discussion therefore equally applies to the Commission's petition for a writ of certiorari in *Steere I*. To the extent that the petition for a writ of certiorari in *ICC v. American Trucking Associations, Inc.*, petition for cert. pending, No. 82-86 (filed July 16, 1982), presents the same issue, our discussion applies to it as well.

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